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No. 73-761

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OCTOBER TERM, 1973

LOUIS HARRY CHIPPAR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that he was denied due process because the government did not call its informant as a witness; that Cuban immigrants and young adults were improperly excluded from the jury; that certain evidence was improperly admitted at trial; and that his sentence was improperly influenced by a prior conviction allegedly invalid under *Gideon* v. *Wainwright*, 372 U.S. 335.

Following a jury trial in the United States District Court for the Southern District of Florida, peti-

tioner was convicted of conspiracy to import, possess, and distribute marijuana, in violation of 21 U.S.C. 846 and 963. He was sentenced to imprisonment for a term of two years, with an additional two years' special parole term. The court of appeals affirmed without opinion (Pet. App. A).

Agent Stevenson of the Bureau of Narcotics and Dangerous Drugs and Juan Ortiz, an informant, were working undercover in the investigation of narcotics traffic by making themselves available as pilots (Tr. 72-73, 84). After having met with co-defendants D'Orsay and Ortiz twice within the previous three days, petitioner, on May 20, 1972, went with Ortiz to the Miami International Airport and looked over some DC-3 and Lockheed Lodestar airplanes (Tr. 79-80). On May 23, 1972, Ortiz and Agent Stevenson met D'Orsay at the airport coffee shop, and after Ortiz introduced Stevenson as his co-pilot on the trip, they discussed in detail the use of a Lockheed Lodestar to transport a load of marijuana from Jamaica to Leesburg, Florida. D'Orsay told Ortiz and Stevenson that petitioner would call co-defendant Stuart Levine sometime after 6:30 that evening, and Levine would convey the information through D'Orsay to Ortiz and Stevenson about when and where to go in Jamaica (Tr. 90-91). After that, D'Orsay would get together with Ortiz and Stevenson and give them final instructions and the money to rent the airplane and to pay for gas and expenses (Tr. 91-92).

On May 24, 1972, Ortiz and Stevenson met with D'Orsay and Levine at the same coffee shop. D'Orsay

stated that petitioner had called him that morning and expected Ortiz and Stevenson to fly into Kingston, Jamaica, at 1:00 p.m. to pick up the load (Tr. 125-127). On the way out of the coffee shop, Levine took Ortiz aside for a few minutes. D'Orsay told Stevenson that they would not be able to contact petitioner in Kingston, but that petitioner would recognize them when they arrived, and that if the airplane did not arrive by 6:00 p.m. in Kingston, petitioner would lose the $8,000 or $9,000 down payment that he had made on the load (Tr. 128-129).

Ortiz and Stevenson flew to Kingston that day, but, despite D'Orsay's urging, they did not arrive until about 11:30 p.m. (Tr. 135). On May 25, about 11:30 a.m., they took off and flew over Kingston, making several touch and go landings at the airport so that petitioner might see them (Tr. 135). During these touch and go landings petitioner was observed on the observation deck, waving at the plane and pounding his fist on the railing when it took off (Tr. 223). When the plane finally landed, petitioner went out to meet it (Tr. 136, 226). Petitioner told Stevenson and Ortiz that he had been forced to pay an extra $5,000 to rent an airstrip about 40 miles west of Kingston for an extra night because they had not come in the day before. He said that he had a political connection in Jamaica who had things under control, and that, if given three hours' notice, he could go into the mountains, where the marijuana was hidden in a dumptruck, and bring it down during the daytime for loading at the airstrip (Tr. 137-

138). Petitioner also stated that, although the marijuana suppliers had tried to raise the price, he was able to negotiate an acceptable price (Tr. 138-139).

Agent Stevenson and Ortiz went with petitioner to his hotel room, where petitioner got in touch with his political connection in Jamaica, to whom he had paid $2,500 for protection (Tr. 140-142). Petitioner stated that the political connection had arranged for them to get a very high grade of marijuana (Tr. 142). The political connection and an Indian man joined them around 4:00 p.m., and arrangements were made to load the marijuana at the Kingston International Airport at 4:00 a.m. the next day, May 26, 1972 (Tr. 152-154). Petitioner and the Indian planned to bring the dumptruck full of marijuana down from the mountains for the loading (Tr. 154-155).

The next morning at about 5:15 a.m., Jamaican police staked out around the airport observed a dumptruck loaded with burlap bags heading toward the airport (Tr. 294-296). A light colored Plymouth Valiant with petitioner and the Indian in it were observed stopping next to the truck and conversing with its occupants (Tr. 297-298, 316-317, 342-343, 346-347). The Valiant turned around and headed back toward the airport (Tr. 298). The truck was then seized by Jamaican police. It was carrying twenty-seven burlap bags, including two which were found to contain marijuana (Tr. 299-302, 322, 330, 334-335, 338). The trunk of the car petitioner was riding in was also found to contain marijuana (Tr. 317-320).

After arriving at the airport, petitioner was arrested as he walked toward the waiting airplane (Tr. 159, 230).

1. Petitioner's contentions that the government's failure to call its informant as a witness violated due process, and that Cuban immigrants and young adults were improperly excluded from the jury, were fully answered in our memorandum in opposition in the companion case of *D'Orsay* v. *United States*, No. 73-5288, certiorari denied, December 3, 1973, upon which we rely here. See, also, our memorandum in opposition on the jury issue in *Crews* v. *United States*, No. 72-6021, certiorari denied, 411 U.S. 908.[1]

2. Petitioner contends that the trial court committed reversible error by allowing into evidence the two burlap bags containing marijuana which were taken from the dumptruck in Jamaica. He rests this contention on the ground that he was never shown to be in physical possession of or have exclusive control over the bags of marijuana, and that the government did not establish chain of custody of the bags. The contention is without merit. Petitioner was not convicted of actual possession, importation, or distribution of marijuana, but rather of conspiracy to possess, import, and distribute marijuana.

The bags of marijuana were admissible because they were being transported in the dumptruck by

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[1] Petitioner's counsel was also D'Orsay's counsel, so he already has a copy of our memorandum in *D'Orsay*. We are, however, providing him with a copy of our *Crews* memorandum.

unindicted co-conspirators pursuant to the conspiracy in which petitioner was shown to have participated. See *United States* v. *Conrad*, 448 F. 2d 271, 276 (C.A. 9). Moreover, the facts were sufficient to show that petitioner had constructive possession of the marijuana. He stated that he and an Indian would go into the mountains, get the dumptruck with the marijuana, and bring it to the airport at 4:00 a.m. At about 5:00 a.m. he and the Indian were seen in a car accompanying the dumptruck toward the airport. They stopped their car next to the dumptruck and spoke with the occupants. These facts were sufficient to show petitioner's constructive possession of the marijuana. See *Quiles* v. *United States*, 344 F. 2d 490, 492-493 (C.A. 9), certiorari denied, 382 U.S. 992.

The chain of custody of the two bags of marijuana was adequately established. They were taken off the dumptruck and placed on the yellow Lodestar airplane in Jamaica by Agent Logay (Tr. 231). The airplane was flown to Montego Bay, Jamaica, with Ortiz and Agent Stevenson aboard (Tr. 206). Ortiz flew the airplane to Opa Locka, where it was met by Agent Stevenson (Tr. 206-207, 232). The airplane then proceeded to Leesburg, Florida, where co-defendant D'Orsay met the airplane and was arrested. Petitioner contends that the bags of marijuana could have been tampered with while Ortiz flew from Montego Bay to Miami. This was most unlikely, since Ortiz was working for the government, and both Agent Logay and Agent Stevenson identified the bags

of marijuana as the ones they put on the airplane in Jamaica (Tr. 167-168, 231-232). Cf. *West* v. *United States*, 359 F. 2d 50, 55 (C.A. 8), certiorari denied, 385 U.S. 867. There was clearly no abuse of discretion in admitting the bags of marijuana into evidence.

4. Petitioner contends that, in sentencing him, the trial court considered a prior conviction allegedly invalid under *Gideon*, *supra*. He raised this issue for the first time in an out-of-time petition for rehearing before the court of appeals, which was denied (Pet. App. D). In contrast to the situation in *United States* v. *Tucker*, 404 U.S. 443, and *Lipscomb* v. *Clark*, 468 F. 2d 1321 (C.A. 5), this issue was not raised in the trial court, nor was it timely raised in the court below, and no factual record has been developed with respect to petitioner's contention. Petitioner's remedy, if any, lies in a motion under Rule 35 for correction or reduction of sentence by the district court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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